STATE OF MICHIGAN

COURT OF APPEALS

DENNIS AHOLA and SANDRA AHOLA,

Plaintiffs-Appellees/Cross-Appellants,

v

GENESEE CHRISTIAN SCHOOL,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
December 15, 2009

No. 283576
Genesee Circuit Court
LC No. 07-086506-NO

Before: Markey, P.J. and Fitzgerald and Gleicher, JJ.

MARKEY, J., (concurring in part and dissenting in part).

I concur in Part III of the majority opinion which concludes that the trial court erred by considering plaintiffs' ordinary negligence claim separate from that of plaintiffs' premises liability claim because both theories are based on the condition of the premises. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001); *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). I respectfully dissent, however, from the conclusion that the trial court erred in finding plaintiffs' premises liability claim barred by the open and obvious doctrine. Consequently, I would reverse the trial court in part as to plaintiffs' Count III, affirm the trial court in part as to plaintiffs' Count I, and remand for entry of summary disposition for defendant.

I believe the majority erred in its analysis of the open and obvious doctrine by not fully considering the statement of that doctrine in *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992). With respect to a premises condition, "where the dangers *are known to the invitee* or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id*. at 96 (emphasis added). Here, the facts are undisputed that plaintiff was aware of the steps at issue having successfully navigated them three hours earlier. See *Ante* at 6 n 2. The majority errs by dismissing plaintiff's knowledge of the steps as an issue of contributory negligence for a jury to determine. *Id*. Rather, the open and obvious doctrine goes to the very heart of whether defendant owes a duty to plaintiff at all. See *Riddle*, *supra* at 96; *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001) ("the open and obvious doctrine" is "an integral part of the definition of that duty"). And, duty is a question of law for the court to decide when there are no genuine issues of material fact. *Moning v Alfono*, 400 Mich 425, 436-437; 254 NW2d 759 (1977). Only when a premises condition has special aspects that make it unreasonably dangerous despite its being open and obvious so that it

presents a "uniquely high likelihood of harm or severity of harm if the risk is not avoided" does the duty to protect invitees from that risk still apply. *Lugo, supra* at 517-519.

I also disagree with the majority's conclusion that the disputed question of fact regarding the extent of illumination available at the time of plaintiff's fall creates a material question of fact whether the steps were unreasonably dangerous. A risk does not become unreasonably dangerous because a "simple remedial measure," i.e. more light, might be available to render the condition safer. *Ante* at 6-7. Rather, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo, supra* at 519. The majority's determination that defendant had "a duty to reasonably maintain the lighting around the steps," *ante* at 7, is not supported by the caselaw it cites; both *Abke v Vandenberg*, 239 Mich App 359, 363-364; 608 NW2d 73 (2000) and *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992) are factually distinguished from the facts of the instant case.

In *Abke*, the plaintiff fell off a loading dock in the defendant's supply barn of which the plaintiff was not aware. In addition to a disputed questions of material fact existing regarding the condition of the lighting and whether a reasonably observant person would have appreciated the risk on casual inspection, *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), the *Abke* Court concluded that the premises in that case near a loading dock, might have been unreasonably dangerous even if the plaintiff had been aware of it. *Abke*, *supra* at 363-364. Similarly, in *Knight*, the plaintiff fell from a loading dock of which he was unaware and had no reason to anticipate. *Knight*, *supra* 127. Further, there was "no evidence that [the] plaintiff could intelligently choose not to encounter the hidden risk posed by the recessed loading dock." *Id*. Not so here, where plaintiff not only was aware of the steps outside the exit, he also chose to use them as a matter of convenience. He could easily have avoided the risk posed by the allegedly dark exit by leaving the building via its middle exit, which plaintiff conceded had more light available.

"[T]he danger of tripping and falling on a step is generally open and obvious." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Indeed, steps and differing floor levels in buildings are so common that a premises owner does not owe a duty to make ordinary steps accident proof or to protect invitees from any harm they present unless special aspects render the steps or differing floor levels unreasonably dangerous. *Id*. at 614-617. I conclude, upon viewing the evidence in a light most favorable to plaintiff, that there is no genuine issue of material fact: Plaintiff fell on steps that were open and obvious with no special aspects. Plaintiff traversed the steps when entering the school earlier in the evening before it was dark in order to attend the basketball game, so plaintiff had the opportunity to take note of the steps before his unfortunate fall. See *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003), abrogated in part on other grounds *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007). The *O'Donnell* Court found that the stairs that the plaintiff attempted to traverse in the dark were open and obvious because plaintiff had viewed and used the stairs earlier in the evening. Here, plaintiff knew or should have known about the steps, passed by an exit with more light, and knew that it was dark when he walked outside, but he proceeded to walk forward into the darkness anyway. Thus, plaintiff knowingly encountered the danger of walking into the darkness.

Moreover, accepting plaintiff's claim regarding the lack of light, the undisputed facts establish it was not so dark that a reasonably prudent person would not have been able to safely traverse the steps. Plaintiff testified that it was not so dark that he was unable to see his feet; he could also see his sons who exited the building with him. One son, Derek Ahola, testified that it was not so dark that he was concerned about his own safety when he was walking. Both sons were able to safely naviagate the steps. Derek also conceded that if his father were paying closer attention to where he was walking, he might have seen the steps. Thus, I conclude the undisputed evidence establishes that an average person of ordinary intelligence would have discovered upon casual inspection the risk of walking into the darkness. *Joyce*, *supra* at 238. Consequently, even accepting plaintiff's claim of darkness, I conclude the steps were an open and obvious condition. *Id*. at 238-240; *O'Donnell*, *supra* at 575-576.

The steps and darkness here were not "effectively unavoidable," *Lugo*, *supra* at 518, nor does the danger of stumbling and falling because of not seeing two steps present an unreasonably high risk of severe injury. *Id*.; *Joyce*, *supra* at 241-243. In other words, falling to the ground under these circumstances, as opposed to falling an extended distance, like that of falling off a loading dock in *Abke*, *supra*, and *Knight*, *supra*, does not present an unreasonably high risk of severe injury. Consequently, there were no special aspects giving rise "to a uniquely high likelihood of harm or severity of harm if the risk is not avoided" to avoid application of the open and obvious danger doctrine. *Lugo*, *supra* at 519.

I would reverse the trial court regarding its ruling that plaintiff set forth a viable separate claim of ordinary negligence, affirm the trial court's ruling that plaintiff's premises liability claim is precluded by the open and obvious doctrine, and remand for entry of summary disposition for defendant. We do not retain jurisdiction.

/s/ Jane E. Markey